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No. 89-146

IN THE

Supreme Court of the United States

October Term, 1989

PRODUCTION MACHINERY CORPORATION,
Petitioner,

vs.

RICHARD TANGO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals of Ohio
For the Eleventh District

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QUESTIONS PRESENTED FOR REVIEW

Application of the Ohio Prevailing Wage Statute to the employees of an employer who renovates its own building, partially with funding from industrial revenue bonds, is not a violation of liberty of contract as guaranteed by Paragraph I of Article I of the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States.

SECOND QUESTION FOR REVIEW

The penalty contained in Ohio Revised Code Section 4115.10 bears a substantial relationship to the protection and promotion of the general welfare and is not an abuse of the State's police power.

PARTIES TO PROCEEDING

Omitted under authority of Rule 34 of the Rules of the Supreme Court of the United States.

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OPINIONS BELOW

Respondent accepts Petitioner's statement regarding Opinions Below and incorporates by reference the Opinions Below appearing in the Appendix to Petitioner's Writ of Certiorari at pages A-1 through A-16 inclusive.

JURISDICTION

Respondent admits the Judgment of the Court of Appeals of Ohio, Eleventh Appellate District, after the refusal of the Ohio Supreme Court to accept jurisdiction, became a final appealable Order for the purposes of this appeal. However, Respondent asserts that this Honorable Court is without jurisdiction to grant Petitioner's Writ of Certiorari.

Petitioner alleges jurisdiction in this Honorable Court under 28 U.S.C., Section 1257(3). Section 1257 provides in pertinent part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question, or the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States . . ."

A review of the questions presented in Petitioner's Petition for Writ of Certiorari will show that both questions presented for review by Petitioner allege violations of the Fourteenth Amendment of the United States Constitution. The first issue presented for review expressly alleges a violation of the Fourteenth Amendment of the United States Constitution. The second issue presented for review merely alleges an abuse of the police power. Respondent construes this allegation to constitute an allegation of a denial of equal

protection under the Fourteenth Amendment of the United States Constitution. However, Petitioner at page 15 of his Petition alleges:

> "It is the contention of the Petitioner that the statutory provision imposing a penalty on the exercise of a right to contract is an interference with that right and with the liberty and rights of the parties to acquire and possess property as guaranteed by Article I of the Ohio Constitution."

It is arguable that Petitioner's second question presented does not even allege an issue within the jurisdiction of this Honorable Court. Petitioner's issue for consideration does not allege any specific statute, treaty or constitutional provision of the United States Constitution which has been violated. Petitioner at page 15 of his Petition alleges a violation of the Ohio Constitution which is not a proper matter for review under 28 U.S.C., Section 1257(3).

Respondent asserts that this Honorable Court should decline jurisdiction under 28 U.S.C., Section 1257(3) as Petitioner never raised any Constitutional challenge to Ohio Revised Code Section 4115.10 in any of the lower courts. This Court has consistently declined jurisdiction in situations where the issues presented for review to this Honorable Court have not been raised or decided in the courts below. In *White River Lumber Company v. Arkansas Ex Rel. Applegate* (1929), 279 U.S. 692, this Honorable Court declined to consider the constitutionality of a state statute where no constitutional challenge to the statute had been raised or decided in the courts below. See also, *McGoldrick v. Compagnie Generale Transatlantique* (1939), 309 U.S. 430, and *Maybee v. White Plains Publishing Company* (1945), 327 U.S. 178.

Notwithstanding Petitioner's statements in its Petition for Writ of Certiorari, at pages 11 and 12, that he questioned the constitutionality of "the penalty provision", in Revised Code Section 4115.10 and further that he alleged a denial of due process regarding the conflict concerning the appropriate statute of limitations to be applied in the underlying action; Petitioner did not challenge the constitutionality of R.C. 4115.10 at trial or on appeal below.

While the record of the Trial Court is not before this Honorable Court, the assignment of errors as set forth on pages 12 and 13 of Petitioner's Petition for Writ of Certiorari clearly show the assignments of error in the Appellate Court did not address the constitutionality of the statute of limitations or the penalty provision of R.C. 4115.10. Further, the Opinion of the Trial Court, appearing at pages A-12 through A-16 of Petitioner's Petition for Writ of Certiorari, demonstrates that the constitutionality of R.C. 4115.10 and the statute of limitations and penalty provision thereunder were never raised or decided by the Trial Court.

Therefore, absent a challenge to the constitutionality of the penalty and/or statute of limitations provisions of Revised Code Section 4115 in the lower courts, Respondent asserts that this Honorable Court should decline jurisdiction in this matter, pursuant to 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Paragraph I of the Ohio Constitution:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and seeking and obtaining happiness and safety."

Fourteenth Amendment to the U.S. Constitution:

"1. . . . no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within in its jurisdiction equal protection of the laws."

"4115.10 Prohibitions.

(a) No person, firm, corporation, or public authority that constructs a public improvement with its own forces the total overall project cost of which is fairly estimated to be more than four thousand dollars shall violate the age provisions of sections 4115.03 to 4115.06 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to him and in addition thereto a sum equal in amount to such difference. The employee may file suit for recovery within sixty days of the

director of industrial relations' determination of a violation of sections 4115.03 to 4115.06 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the department of industrial relationship upon a form furnished by the department. At the written request of any employee paid less than the prevailing rate of wages applicable, the director shall take an assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the director determines there is a violation of sections 4115.03 to 4115.16 of the Revised Code and sixty days have elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the director take an assignment of a wage claim pursuant to division (B) of this section;

The director shall bring any legal action necessary to collect any amounts owed to employees and in addition thereto as a penalty an amount equal to the amounts so collected. The director shall pay over to the affected employees the amounts collected including the penalty amounts collected. In any action in which the director prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where workmen are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for himself or any other person, shall request, demand, or receive, either before or after such a workman is engaged, that such workman pay back, return, donate, contribute, or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand shall prevent such workman from procuring or retaining employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(E) The department of industrial relations shall enforce sections 4115.03 to 4115.16 of the Revised Code."

STATEMENT OF THE CASE

On March 4, 1985, Respondent received from the Director of the Ohio Department of Industrial Relations, a determination notice that Respondent had been paid less than the prevailing wage for work performed at a public improvement site.

On May 3, 1985, Respondent commenced suit in Lake County Court of Common Pleas seeking money damages pursuant to Chapter 4115 of the Ohio Revised Code.

After bench trial, judgment was rendered in favor of Respondent on November 10, 1987. The Court awarded Respondent, Twenty-eight Thousand Two Hundred Sixteen Dollars ($28,216.00) plus reasonable attorney fees in the amount of Ten Thousand Five Hundred Forty Dollars and Thirty-Eight Cents ($10,540.38).

Petitioner filed its Notice of Appeal with the Eleventh District Court of Appeals for Lake County on November 19, 1987.

On January 3, 1989, the Eleventh District Court of Appeals unanimously affirmed the judgment of the Trial Court.

On January 27, 1989, Petitioner, Production Machinery Corporation, filed its Notice of Appeal in the Ohio Supreme Court. The Ohio Supreme Court overruled a Motion to Certify the Record in an Entry dated April 12, 1989, thereby declining to accept the case for review.

Petitioner now seeks to have the judgment of the Eleventh District Court of Appeals for Lake County, Ohio reversed based on certain alleged Constitutional violations which were not alleged below.

SUMMARY OF ARGUMENT

Petitioner is seeking to have this Court review the constitutionality of Section 4115 of the Ohio Revised Code. Section 4115 is the Ohio Prevailing Wage Statute.

Petitioner alleges the application of the Ohio Prevailing Wage Statute to Petitioner constitutes an interference with his liberty of contract as protected by the Fourteenth Amendment of the United States Constitution. Notwithstanding Petitioner's failure to raise this issue at trial, Respondent asserts that the Ohio Prevailing Wage Statute is Constitutional and is not an infringement on Petitioner's liberty of contract.

Petitioner cites no case law for the proposition that the Ohio Prevailing Wage Statute violates the liberty of contract as protected under the Fourteenth Amendment. In fact, Petitioner admits "whereas, the right of the State to enforce 'prevailing wages' on contractor's employed on a project will be conceded." This admission by Petitioner admits the constitutionality of prevailing wage statutes in general and merely challenges the application of the statute to the particular facts of the instant action. This is not a basis for a constitutional violation.

Petitioner as a second issue for review asserts that the penalty contained in Revised Code Section 4115.10 is an abuse of the police power. Respondent construes this issue to allege a denial of equal protection under the Fourteenth Amendment.

Again, Petitioner cites no case law in support of the proposition that the penalty provision of R.C. 4115.10 constitutes an abuse of the police power. Respondent asserts that the penalty, requiring an employer found in violation of Revised Code Section 4115.10 to pay the employee double the amount of the unpaid wages, constitutes a valid penalty in exercise of the police power and is in furtherance of the legitimate social and economic policies furthered by the Ohio Prevailing Wage Statute.

ARGUMENT

As set forth in the Jurisdictional Statement, Respondent urges this Court to decline jurisdiction in this matter. Notwithstanding Respondent's belief that this Honorable Court should decline jurisdiction in this matter, Respondent asserts Petitioner's questions presented for review are without merit and that the decision of the Eleventh District Court of Appeals for the State of Ohio should be affirmed.

The case at bar simply does not raise the issue of liberty of contract. Petitioner chose to apply for and accept industrial revenue bonds in partial financing of its improvements. Upon acceptance of the industrial revenue bonds, Petitioner was bound by the Ohio Prevailing Wage Statute. O.R.C., Section 4115.03. Petitioner's liberty of contract was not impaired as Petitioner was not required to accept industrial revenue bonds for the financing of its project. Petitioner was free to contract with its employee in any manner it wished until it accepted the funds of the industrial revenue bonds. Upon accepting these industrial revenue bond funds, Petitioner's project became a public improvement and therefore all employees, whether the employees of contractors, subcontractors or the Petitioner, became subject to the Prevailing Wage Statute applying to public works. Therefore, Petitioner's claims relating to a violation of the liberty of contract are without merit and should not be considered by this Honorable Court.

The standard to be applied in ruling on a liberty of contract claim was set forth by this Honorable Court in *Warehouse Company v. Tobacco Growers* (1927), 276 U.S. 71. The Court in *Warehouse Company* wrote:

> "The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose. *Miller v. Wilson,* 236 U.S. 373, 380, *Lindsley v. Natural Carbonic Gas Company,* 220 U.S. 61, 78. A provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute does not invalidate it. *St. Louis Iron Mountain & Southern Railway Co. v. Williams, et al.,* 251 U.S. 63, 66."

Application of the standard set forth in *Wilson, supra* demonstrates that Plaintiff's liberty of contract claim is without merit. The Prevailing Wage Statute at issue clearly furthers a legitimate government interest in promoting fair wages for employees involved in public works and insuring that they are compensated at the wage prevailing in the locality of the construction project.

Although the constitutionality of prevailing wage statutes has not been directly passed upon by this Court, the Court had the occasion to consider a prevailing wage provision in *U.S. v. Binghamton Construction Co.* (1953), 347 U.S. 171. The Court in *Binghamton*, although it had the opportunity to, did not invalidate the prevailing wage provision.

Treating Petitioner's constitutional claim regarding application of the Prevailing Wage Statute to Petitioner as an allegation of denial of equal protection, it is again apparent that Plaintiff's Constitutional claims under the Fourteenth Amendment are without merit. Treating Petitioner's First Question presented as an allegation that the statute is not invalid on its face, but rather is invalid in its application to Petitioner, the question

becomes whether the application of the statute to Petitioner denied Petitioner equal protection of the laws. As stated by this Honorable Court in *Snowden v. Hughes* (1943), 321 U.S. 1:

> "The unlawful administration of a state statute fair on its face, resulting in unequal application to those entitled to be treated alike, is not a denial of equal protection unless there is shown to be present an element of intentional or purposeful discrimination."

Applying the standard of *Snowden* to the case at bar, it is apparent that Petitioner's equal protection claims are without merit. Petitioner's claim is that the Court's decision, that Petitioner had violated the Ohio Prevailing Wage Law, constituted a denial of equal protection to Petitioner. Petitioner alleges that the application of the Ohio Prevailing Wage Law to Petitioner, for failure to pay its own employees the prevailing wage when they were involved in the construction of a public improvement, was a denial of equal protection. Petitioner does not allege nor does the record demonstrate, any allegation or evidence of intentional or purposeful discrimination. Therefore, the application of the Ohio Prevailing Wage Law to Petitioner cannot be a denial of equal protection. *Snowden, supra* at page 2. There is no allegation or demonstration that the application of the Ohio Prevailing Wage Law to Petitioner was done with an improper motive or in an unequal manner. *Yick Wo v. Hopkins* (1885), 118 U.S. 356, 374.

The penalty provision contained in the Ohio Prevailing Wage Statute is a valid application of the police power in furtherance of the State's right to regulate the disposition of public funds used on public projects. Given the validity of the Ohio Prevailing Wage Statute, as is conceded by Petitioner, the penalty

provision is a legitimate and rationally related method of enforcing the Prevailing Wage Statute. Double and treble damages are an accepted sanction under the law as evidenced by the antitrust laws of the United States. (The Clayton Act, 15 U.S.C.S., Section 15, *see also, Hanover Shoe, Inc. v. United Shoe Machinery Co.* (1968), 392 U.S. 481, *re-hearing denied* 393 U.S. 901). Petitioner's argument that the imposition of double wages as a penalty is an abuse of the police power is without merit and should not be accepted for hearing by this Honorable Court.

The constitutionality of a penalty, if properly applied in furtherance of the public policy of the statute, has been upheld by this Court so long as it is not unreasonable. As stated by the Court in *Warehouse Co., supra*: "A provision for a penalty to be received by the aggrieved party as punishment for the violation of a statute does not invalidate it."

Although Petitioner does not raise the issue of statute of limitations in his questions presented, Petitioner gives extensive treatment to it in his argument. The proper statute of limitation to be applied in an Ohio Prevailing Wage case is not a proper matter for review by this Honorable Court as it does not meet the jurisdictional requirements of 28 U.S.C., Section 1257(3).

This appeal presents no questions arising under the treaties or laws of the United States; no treaty or statute of the United States is drawn into question. As more fully set forth in Respondent's jurisdictional statement, the questions presented alleging constitutional violations were not raised or decided below and this Honorable Court should decline jurisdiction in this matter based on the authority of *White River Lumber, supra; McGoldrick, supra;* and *Maybee, supra.*

CONCLUSION

Based on the lack of any constitutional question, or other appropriate basis for jurisdiction in this Honorable Court, Respondent requests this Honorable Court to decline jurisdiction and to deny Petitioner's Petition for Writ of Certiorari. Additionally, or in the alternative, Respondent asserts that the Ohio Prevailing Wage Statute does not constitute a violation of the liberty of contract as provided in the Fourteenth Amendment of the United States Constitution and that the penalty provision contained in R.C. 4115.10 is rationally related to the enforcement of the Ohio Prevailing Wage Statute and does not constitute an abuse of the police power under the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Respondent respectfully requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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